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No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

—v.—

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE CIVIL RIGHTS CLINIC AT HOWARD UNIVERSITY SCHOOL OF LAW, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLEES AND INTERVENOR-APPELLEES

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B. Altman & Co. v. United States, 224 U.S. 583 (1912) 4

Baker v. Carr, 369 U.S. 186 (1962)..... 22

Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001)..... 22

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Collins v. Weinberger, 707 F.2d 1518 (D.C. Cir.1983) 20

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El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999) 5, 18, 21

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Fellow v. Blacksmith, 60 U.S. 366 (1856)..... 5, 17

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Foster v. Neilson, 27 U.S. 253 (1829) 5, 12, 21

Hamdan v. Rumsfeld, 548 U.S. 557 (2006) ... 24

Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244 (C.D. Cal. 1999) 22

Heinrich v. Sweet, 49 F. Supp 2d 27 (D. Mass. 1999)..... 22

Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989) 17

Igartua De La Rosa v. United States, 32 F.3d 8 (1st Cir. 1994)..... 22

In re Extradition of Cheung, 968 F. Supp 791 (D. Conn. 1997)..... 22

Iwonowa v. Ford Motor Co., 67 F. Supp. 2d 424 (N.J. 1999)..... 20

Johnson v. Eisentrager, 339 U.S. 763 (1993)..... 18

Kolovrat v. Oregon, 366 U.S. 187 (1961) 17

Maiorano v. Baltimore & O. R. Co., 213 U.S. 268 (1909) 5

Marbury v. Madison, 5 U.S. 137 (1803)..... 16

McCaughn v. Hershey Chocolate Co., 283 U.S. 488 (1931) 25

Medellin v. Texas, 128 S. Ct. 1346 (2008)..... 4, 12

Nagle v. Loi Hoa, 275 U.S. 475 (1928)..... 25

O'Connor v. United States, 479 U.S. 27 (1986)..... 18

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Osborn v. Bank of the United States, 9 Wheat. 738 (1824)..... 17

Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784) 29

Rousseau v. Brown, 21 App. D.C. 73 (1903).. 23

Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006)..... 5, 16

Sullivan v. Kidd, 254 U.S. 433 (1920) 17, 18, 20

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982)..... 18, 20

Talbot v. Janson, 3 U.S. (3 Dall.) 133 (1795)..... 29

Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801)..... 29

The Antelope, 23 U.S. (10 Wheat) 66 (1825) .. 29

The Nereide, 13 U.S. (9 Cranch) 388 (1815) .. 29

The Paquete Habana, 175 U.S. 677 (1900).... 30

The Scotia, 81 U.S. (14 Wall.) 170 (1871) 29

Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191 (1815)..... 29

TransWorld Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984)..... 25

United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 155 F. 842 (1st Cir. 1907)..... 23

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United States v. Arjona, 120 U.S. 479 (1887) 29

United States v. Belmont, 301 U.S. 324 (1937) 5

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 18, 19, 24

United States v. Noriega, 808 F. Supp. 791 (S.D. Fl. 1992) 20

United States v. Old Settlers, 148 U.S. 427 (1893) 17

United States v. Percheman, 32 U.S. 51 (1833) 21

United States v. Schooner Peggy, 5 U.S. 103 (1801) 5, 16

Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) ... 29

Weinberger v. Rossi, 456 U.S. 25 (1982) 4

White v. Paulsen, 997 F. Supp. 1380 (E.D. Wash. 1998) 22

Whitney v. Robertson, 124 U.S. 190 (1888) ... 12, 23

Williams v. Taylor, 529 U.S. 362 (2000) 16

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 23

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Constitutional Provisions, Statutes and Treaties:

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Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973-1973bb-1 .....*passim*

International Convention on the Elimination of All Forms of Racial Discrimination, September 28, 1966, 660 U.N.T.S. 195 .... 6, 8

International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171..... 6, 7

S. Res. 4783, 102d Cong., 2d Sess. (1992) 11

United Nations Documents:

Core document forming part of the reports of states parties: United States, U.N. Doc. HRI/Core/USA 2005 (2006)..... 10

Statement of Conrad Harper, Legal Advisor, United States Department of State, to the United Nations Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995) 12

U.N. CCPR, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Initial Reports of States Parties Due in 1993*, United States of America, CCPR/C/81/Add. 4 (1994) 12, 13

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U.N. CCPR, 53th Sess., 1401 mtg., U.N. Doc. CCPR/C/SR.1401 (1994) 15

U.N. CCPR, *General Comment No. 25: The right to participate in public affairs, voting rights and the right to equal access to public service*, art. 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996) 7

U.N. CERD, *Report of the Committee on the Elimination of Racial Discrimination: 51st Session of the General Assembly, Supplement No. 18*, U.N. Doc. A/51/18 (1996)..... 8

U.N. CERD, *Reports Submitted by States Parties Under Article 9 of the Convention: Third periodic reports of States parties due in 1999*: United States of America, U.N. Doc. CERD/C/351/Add.1 (2000) 10, 12

U.N. CERD, 59th Sess., 1474 mtg., U.N. Doc. CERD/C/SR.1474 (2003)..... 13

U.N. CERD, *Reports Submitted by State Parties Under Article 9 of the Convention: Sixth periodic reports*, U.N. Doc. CERD/C/USA/6 (2007) 15

PAGE

U.N. CERD, *Seventy-second session Geneva: Questions Put By the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America*, U.N. Doc. CERD/C/USA/6 (2008) 11

U.N. CERD, *Written Replies to the Questions Put By the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America*, U.N. Doc. CERD/C/USA/6 (2008) 14

U.N. CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding observations of the CERD Committee*, U.N. Doc. CERD/C/USA/CO/6 (2008) 15

Electronic Sources:

Library of Congress, Thomas, Treaties, *Treaty Number: 95-20, International Covenant on Civil and Political Rights – Legislative Actions* 11

Library of Congress, Thomas, Treaties, *Treaty Number: 95-20, International Covenant on Civil and Political Rights – Legislative History* 6

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Library of Congress, Thomas, Treaties, *Treaty Number: 95-18, International Convention on the Elimination of All Forms of Racial Discrimination – Legislative History* 6

Library of Congress, Thomas, Treaties, *Treaty Number: 95-18, International Convention on the Elimination of All Forms of Racial Discrimination – Legislative Actions* 11

Legal Periodicals Authorities:

William Blackstone, *Review of W. Blackstone: Commentaries*, 25 Am. Jour. Leg. Hist. 74 (1981) 28

David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986)..... 28

Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 Stan. L. Rev. 703 (1975) 27

James Jennings, *The International Convention on the Elimination of All Forms of Racial Discrimination (CERD): The International Convention on the Elimination of All Forms of Racial Discrimination: Implications for Challenging Racial Hierarchy*, 40 How. L.J. 597 (1997) 33

PAGE

Nelson Lund, *Rousseau and Direct Democracy*, 13 J. Contemp. Legal Issues (2004) 27

Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harvard L. Rev. 1 (1987) 2

Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law* 117 Yale L.J. 550 (2008)..... 4

Gay J. McDougall, *The International Convention on the Elimination of All Forms of Racial Discrimination (CERD): Introduction: Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 How. L.J. 571 (1997) 33

Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of Lochner v. New York*, 1 N.Y.U. J. L. & Liberty 515 (2005)..... 28

Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 Harv. Hum. Rts. J. 15 (1996)..... 33

Tim Wu, *Treaties' Domains*, 93 Va. L.R. 571 (2007)..... 18

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Books:

Carol Anderson, *Eyes off the Prize: the United Nations and the African American Struggle for Human Rights, 1944-1956* (2003)..... 31

David Brion Davis, *The Emergence of Immediatism in British and American Antislavery Thought* (1975)..... 30

Susan M. Glisson, *The Human Tradition in the Civil Rights Movement (Human Condition in America)* (2006)..... 31

Immanuel Kant, *Political Writings* (Hans Reiss ed. & H. B. Nisbet trans., Cambridge Univ. Press, 1991) (1793) 27

Ruth A. Ketrin, *Charles Osborn in the Anti-Slavery Movement* (1937) 30

Azza Salama Layton, *International Politics and Civil Rights Policies in the United States 1941-1960* (2000)..... 32

John Locke, *Two Treatises of Government* (P. Laslett ed. Cambridge University Press, 1988) (1690) 27

Alasdair MacIntyre, *After Virtue* (2d ed., 1984) 27

PAGE

John Stuart Mill, *On Liberty* (John Gray ed. Oxford Univ. Press, 1991) (1859) 27

Robert C. Morris, *Reading, 'Riting, and Reconstruction: The Education of Freedmen in the South 1861-1870* (1981)..... 31

Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (1988)..... 28

William L. Patterson, *We Charge Genocide: The Crime of Government Against the Negro People* (1970) 32

Jean-Jacques Rousseau, *Discours sur l'économie politique* in *Ouevres Completes* (Bernard Gagnebin & Marcel Raymond eds., 1964) (1775)..... 27

Miscellaneous:

Herbert Aptheker, *The Quakers and Negro Slavery* in The Journal of Negro History, Volume 25, 1940 30

Thomas Jefferson, *The Declaration of Independence* (1776)..... 27

Eleanor Roosevelt, On the Adoption of the Universal Declaration of Human Rights (December 9, 1948) 32

Malcolm X, The Leverett House Forum of March 18, 1964 33

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Unknown, *This Country Our Only Home* (May 9, 1840) in The Journal of Negro History, Volume 4, 1919..... 30

STATEMENT OF INTEREST

Amici curiae are faculty members at Howard University School of Law and the Supervising Attorney and Student Attorneys of the Civil Rights Clinic at the Law School.[1] We submit this brief in support of the Appellees and Intervenor-Appellees in order to respectfully urge this Honorable Court to uphold the decision of the United States District Court for the District of Columbia.

For one hundred and forty years, through the work of such former and current deans and professors as C. Clyde Ferguson, Jr., James M. Nabrit, Goler Teal Butcher, Lisa A. Crooms, Marsha A. Echols, and Ziyad Motala, among others, Howard University School of Law has long placed the struggle for racial equality in the United States in the broader context of international human rights norms. It is in the spirit of that tradition that *Amici* respectfully submits that the District Court's decision should be upheld because Section 5 of the Voting Rights Act represents a partial fulfillment of United States treaty obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR).

SUMMARY OF ARGUMENT

On September 28, 1966, and October 5, 1977, respectively, the United States signed the Interna-

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of Amicus Curiae's intention to file this brief. All parties have provided consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of the brief.

tional Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR). Nearly twenty years following our signature of the ICERD, the Senate ratified both treaties, first the ICCPR in 1992, and then the ICERD in 1994. As a party to two of the most important human rights documents of the last century, we renewed before the community of nations a promise we had originally made to ourselves at our constitutional founding, and had tried to keep—often faithfully but sometimes only fitfully—through one civil war, several constitutional amendments, and still ongoing social movements: that all human beings, regardless of race, sex, religion or national origin, are equal before the law and are entitled to certain fundamental civil and political rights.

Signing and ratifying these two treaties was not a mere symbolic gesture to celebrate that which we had already achieved. Rather, it was both an implicit concession to the unfinished business of fixing what Justice Thurgood Marshall called "the Constitution's inherent defects,"[2] as well as a fitting acknowledgment of the international roots of the American concept of human equality. Thus, when Congress initially enacted the Voting Rights Act in 1965, and when it reauthorized the Act's pre-clearance provisions in 2006, those legislative actions fulfilled in part our treaty obligations under ICERD and ICCPR to protect the rights of all citizens to vote free from racial discrimination.

Indeed, since legislative passage and reauthorization of the Act, the Executive Branch has

[2] Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harvard L. Rev. 1 (1987).

unequivocally held up the Voting Rights Act to the international community as evidence of our fulfillment of ICERD and ICCPR obligations. This Court has a long tradition of according great deference to the interpretation of treaties by the political branches based on the Court's recognition that it is in the country's best interest to have the government speak with one voice when dealing with other nations, as well as the Court's respect for the particular expertise of those government agencies charged with administering treaties. The present political interpretation of the Voting Rights Act as the fulfillment of our treaty obligations deserves no less a degree of deference and no less a measure of respect.

To submit that among the bases, upon which the Court ought to uphold Section 5 of the Voting Rights Act of 1965, are our commitments to international treaties is not to engage in an academic meditation over the proper role of foreign sources of law in domestic precedent. It is merely to make two points: first, ratified treaties such as ICERD and ICCPR are not foreign sources of law but rather the supreme law of the land, no different from and not inferior to constitutional enactments and federal statutes; and second, whether judged from the founders grounding our political philosophy in the works of European enlightenment thinkers, the abolitionists modeling their anti-slavery appeals on the British abolition movement, or post World War II civil rights activists framing their challenge to Jim Crow segregation as part of the larger anti-colonial struggle of peoples of color in Africa, Asia, and the West Indies, our homegrown notions of liberty and equality have always been from the first and remain to this day deeply inspired by, inextricably intertwined with, and fundamentally inseparable from international norms of human freedom and justice.

ARGUMENT

I.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) AND THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD) ARE PART OF THE SUPREME LAW OF THE LAND, AND IMPOSE AN OBLIGATION UPON THE UNITED STATES TO PROTECT THE RIGHT OF CITIZENS TO VOTE FREE FROM RACIAL DISCRIMINATION

A. Treaties are Part of the Supreme Law of the Land

A treaty is "a compact made between two or more independent nations, with a view to the public welfare." *B. Altman & Co. v. United States*, 224 U.S. 583, 600 (1912).[3] As a solemn expression of national commitment, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Edye v. Robertson*, 112 U.S. 580, 598 (1884). Though scholars have long advanced customary international law as a legitimate basis for abiding by treaty commitments[4], American treaty obligations are firmly

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[3] *See also Medellin v. Texas*, 128 S. Ct. 1346, 1357 (2008) ("A treaty is, of course, 'primarily a compact between independent nations."); *Edye v. Robertson*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."); *Weinberger v. Rossi*, 456 U.S. 25, 29 (1982) ("Under principles of international law, the word [treaty] ordinarily refers to an international agreement concluded between sovereigns.")

[4] Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law* 117 Yale L.J. 550 (2008).

rooted in our own constitutional text and jurisprudential precedent. Article VI, Clause 2 provides that, along with federal constitutional provisions and federal statutes, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." In terms of precedent, since the jurisprudential version of time immemorial, this Court has recognized that treaties are not a lesser species of federal law,[5] and that "[u]nder the Supremacy Clause [of the United States Constitution,] a treaty is 'to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.' " *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 373 (2006) (quoting *Foster v. Neilson*, 27 U.S. 253 (1829)).

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[5] *See Ware v. Hylton*, 3 U.S. 199, 236 (1796) (holding that treaties made by the authority of the United States are superior to the Constitution and laws of individual States); *United States v. Schooner Peggy*, 5 U.S. 103, 109 (1801) (holding that a treaty, affecting the rights of parties litigating in court is to be regarded by the court as an act of Congress); *Fellow v. Blacksmith*, 60 U.S. 366, 372 (1857) (holding that courts are prohibited from using tactics that would work to annul a treaty's effect and purpose in the same manner as they are prohibited concerning acts of Congress); *De Geofroy v. Riggs*, 133 U.S. 258, 266 (1890) (holding that the treaty power is unlimited except for those specific restrictions found within the Constitution); *Maiorano v. Baltimore & O. R. Co.*, 213 U.S. 268, 272-73 (1909) (holding that courts are under an obligation to enforce treaties in litigation involving private rights); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (holding that governmental power over external affairs is vested exclusively in the national government and such powers should be exercised without regard to state laws or policies); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 181 (1999) (holding that state laws regarding tort liability are unenforceable if they undermine the purpose of the treaty).

B. ICCPR and ICERD are Part of the Supreme Law of the Land And, as such, Impose an Obligation on the United States to Protect The Right of Citizens to Vote Free from Racial Discrimination

The United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR) in the 1960s.[6] Approximately one year after the passage of the Voting Rights Act of 1965, the United States signed the ICERD. Eleven years later, the United States signed the ICCPR.[7] The Senate provided the advice and consent for ratification of the ICCPR in 1992 and the ICERD in 1994. Since their ratification, the United States has filed periodic reports with and appeared before the Human Rights Committee and the Committee on the Elimination of Racial Discrimination to elaborate on US compliance with its treaty obligations.

The ICCPR envisions that a state party will respect individuals within its territory "without dis-

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[6] International Convention on the Elimination of All Forms of Racial Discrimination, September 28, 1966, 660 U.N.T.S. 195 [hereinafter ICERD or the Race Convention]; and the International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[7] Library of Congress, Thomas, Treaties, *Treaty Number: 95-18*, *International Convention on the Elimination of All Forms of Racial Discrimination—Legislative History*, *available at* http://thomas.loc.gov/cgi-bin/ntquery/D?trtys:1:./temp/~trtysn0Kqw8:: (last visited Mar. 22, 2009); Library of Congress, Thomas, Treaties, *Treaty Number: 95-20*, *International Covenant on Civil and Political Rights—Legislative History*, *available at* http://thomas.loc.gov/cgi-bin/ntquery/D?trtys:1:./temp/~trtysMt1Fk1:: (last visited Mar. 22, 2009).

tinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, art. 2, December 16, 1966, 999 U.N.T.S. 171. Specifically, the ICCPR states:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: [. . .] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors[.][8]

ICCPR, art. 25, December 16, 1966, 999 U.N.T.S. 171.

The Human Rights Committee (HRC) is the body responsible for monitoring implementation of the ICCPR. According to the HRC, Article 25 of the ICCPR "lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant."[9] This article "requires States to adopt such legislative and other measures as may be necessary to ensure that

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[8] Article 2 requires that each State that is a party to the treaty must undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, art. 2, December 16, 1966, 999 U.N.T.S. 171.

[9] U.N. CCPR, *General Comment No. 25: The right to participate in public affairs, voting rights and the right to equal access to public service*, art. 25, U.N.Doc. CCPR/C/21/Rev. 1/Add. 4 ¶ 1 (1994). *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument.

citizens have an effective opportunity to enjoy the rights it protects," which includes the right to vote.[10] The right to vote cannot "be suspended or excluded except on grounds which are established by law and which are objective and reasonable."[11] The use of race to deprive citizens of their voting rights is neither objective nor reasonable.

The ICERD is founded on the principle that "all human beings are equal before the law and are entitled to equal protection of the law against any discrimination" and that "the existence of racial barriers is repugnant to the ideals of any human society." *See* Convention on the Elimination of Racial Discrimination, September 28, 1966, 660 U.N.T.S. 195. Specifically, the ICERD requires that:

> State parties. . . prohibit and. . .eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of [. . .] [p]olitical rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage[.]

ICERD, art. 5(c), September 28, 1966, 660 U.N.T.S. 195 [hereinafter ICERD Article 5].

Article 5 of the ICERD "obligates. . .States Parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination."[12] As the Committee

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[10] *Id.*

[11] *Id.* at ¶ 4.

[12] U.N. CERD, *Report of the Committee on the Elimination of Racial Discrimination: 51st Session of the General*

on the Elimination of Racial Discrimination has noted, "[a]t the head of these rights and freedoms are those deriving from the Charter of the United Nations and the Universal Declaration of Human Rights," most of which "have been elaborated in the International Covenants on Human Rights,"[13] such as the ICCPR. While "[a]ll States Parties are. . .obliged to acknowledge and protect the enjoyment of human rights, . . .the manner in which these obligations are translated into the legal orders of States Parties may differ."[14] The Committee on the Elimination of Discrimination further notes that "Article 5. . .apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights."[15]

C The Executive Branch Has Interpreted The Voting Rights Act, and its Pre-Clearance Provisions, As fulfilling in part our treaty obligations under ICCPR and ICERD

In light of the fact that the United States has signed and ratified both the ICCPR and the ICERD, it has an obligation to protect all citizens' right to vote, especially those whose rights might be imper-

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Assembly, *Supplement No. 18*, U.N. Doc. A/51/18, p. 124 ¶ 1 (1996), *see* http://daccessdds.un.org/doc/UNDOC/GEN/N96/257/38/PDF/N9625738.pdf?OpenElement .

[13] *Id.*

[14] *Id.*

[15] *Id.*

iled because of racial discrimination. The Executive Branch has admitted as much in both the documents it has filed with the United Nations Committees overseeing implementation status of ICCPR and ICCPR, Human Rights Committee and the Committee on the Elimination of Racial Discrimination, and its testimony before these two treaty-bodies. The core document filed with the United Nations by the Executive Branch identified the Voting Rights Act of 1965 as supplementing "the constitutional protection afforded by the Equal Protection Clause of the Fourteenth Amendment against discrimination by the state governments on the basis of race, color, or national origin."[16] The initial periodic report filed with the Committee on the Elimination of Racial Discrimination described the Voting Rights Act as including "specialized mechanisms that apply to areas of the country with the most severe history of discrimination against Blacks."[17] The report continued, "[t]his part of the Act requires federal preapproval for any proposed changes in voting laws and practices to prevent the implementation of new discriminatory laws."[18] In addition, as part of the February 2008 hearing before the Committee on the Elimination of Racial Discrimination, high-level members of the Executive Branch characterized the Voting Rights Act as "one of the most effective civil

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[16] Core document forming part of the reports of states parties: United States, U.N. Doc. HRI/Core/USA 2005 (16 January 2006) at ¶ 133.

[17] U.N. CERD, *Reports Submitted by States Parties Under Article 9 of the Convention: Third periodic reports of States parties due in 1999: Addendum:* United States of America, U.N. Doc. CERD/C/351/Add.1 (10 October 2000) at ¶ 95.

[18] *Id.*

rights statutes ever enacted by Congress,"[19] further contending that United States' treaty obligations have been met by, *inter alia*, the Voting Rights Act of 1965 and its subsequent reauthorizations.

Admittedly, when the United States initially signed and subsequently ratified the ICERD and the ICCPR, we did so subject to the declaration that neither treaty was self executing.[20] Thus, the ICERD declaration specifically states "that the provisions of the Convention are not self-executing."[21] *Id.* Likewise, Senate consent to the ICCPR was accompanied by a declaration "that the provisions of Articles 1 through 27 are not self executing." *Id.* S. Res. 4783, 102d Cong., 2d Sess. (1992).[22]

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[19] U.N. CERD, *Seventy-second session Geneva, 18 February-7 March 2008, Questions Put By the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America*, U.N. Doc. CERD/C/USA/6 (2008) at p. 14.

[20] Library of Congress, Thomas, Treaties, *Treaty Number: 95-18, International Convention on the Elimination of All Forms of Racial Discrimination—Legislative Actions, available at* http://thomas.loc.gov/cgi-bin/ntquery/D?trtys:1:./temp/~trtysowwrRK:: (last visited Mar. 10, 2009); Library of Congress, Thomas, Treaties, *Treaty Number: 95-20, International Covenant on Civil and Political Rights—Legislative Actions, available at* http://thomas.loc.gov/cgi-bin/ntquery/D?trtys:1:./temp/~trtys7StCnV:: (last visited Mar. 10, 2009).

[21] The specific declaration adopted by the Senate at the time it ratified the ICERD reads as follows: "the United States declares that the provisions of the Convention are not self-executing." http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=319&chapter=4&lang=en#EndDec (last visited March 2, 2009).

[22] These declarations were among the Reservations, Declarations and Understandings filed with the appropriate treaty-

As interpreted by the Executive Branch, these declarations prohibit "only a private and independent cause of action," unless Congress enacts legislation that grants individuals a justiciable cause of action as a matter of U.S. law." *See* Statement of Conrad Harper, Legal Advisor, United States Department of State, to the United Nations Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995).[23] These declarations, however, do not affect the obligations of the United States under either the ICERD or the ICCPR. *See Foster v. Neilson*, 27 U.S. 253, 314-15 (1829).[24]

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body when the ICCPR and the ICERD were finally ratified in 1992 and 1994, respectively. *Id.*

[23] This Court recently reiterated this principle, stating that "a 'non-self executing' treaty does not by itself give rise to domestically enforceable federal law." *Medellin v. Texas*, 128 S.Ct. 1346, 1356 (2008); s*ee* also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject").

[24] *See* U.N. CERD, *Reports Submitted by States Parties Under Article 9 of the Convention*, *Third periodic reports of States parties due in 1999*: United States of America, ¶ 170, U.N. Doc. CERD/C/351/Add.1, 10 October 2000 (The non-self-executing "declaration has no effect on the international obligations of the United States or on its relations with States parties.") http://www.state.gov/documents/organization/100306.pdf ; U.N. CCPR, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, *Initial Reports of States Parties Due in 1993* Addendum, United States of America, ¶ 8, U.N. Doc. CCPR/C/81/Add. 4 (24 August 1994). (The non-self-executing "declaration did not limit the international obligations of the United States under the Covenant.") http://daccessdds.un.org/doc/UNDOC/GEN/G94/187/90/PDF/G9418790.pdf?OpenElement;)

In fact, in each periodic report the United States has filed and defended since ratifying both the ICCPR and the ICERD, the Executive Branch has reported that its treaty obligations to protect voting rights are enforced through, *inter alia*, the Voting Rights Act of 1965. The State Department, charged with the duty to report to the appropriate committee about domestic efforts to implement the ICCPR and the ICERD, has contended that the Voting Rights Act of 1965 and the corresponding Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 are constitutionally valid measures that make enforceable the voting rights provisions found in the ICERD and the ICCPR. While reviewing the federal laws to ensure compliance with its treaty obligations, the State Department reported that: "In 1965, Congress had passed the Voting Rights Act, which prohibited discrimination by public officials in the voting process. [The Voting Rights Act] accelerated the participation of African-Americans in the political and electoral process, particularly in the South." U.N. CERD, 59th Sess., 1474 mtg. at ¶ 12, U.N. Doc. CERD/C/SR.1474 (May 22, 2003). The State Department explained that Section 2 of the Voting Rights Act protects people from discrimination to the right to vote since the right "may be enforced by a private suit to vindicate denials of the Fifteenth Amendment rights, i.e. intentional denials or limitations on the right to vote or to exercise an effective vote." U.N. CCPR, *Reports Submitted by State Parties Under Article 40 of the Covenant: First periodic reports*, ¶ 98, U.N. Doc. CCPR /C/81/Add.4 (August 24, 1994).

Furthermore, in a 2008 report, the State Department specified that Section 5 of the Voting Rights Act protects its citizens from racial discrimination:

> Section 5 of the Voting Rights Act freezes changes in election practices or procedures in certain states until the new procedures have been determined not to have a discriminatory purpose or effect either by a special federal court panel or the Attorney General of the United States. This requires proof that the proposed voting change does not deny or abridge the right to vote on account of race, color, or membership in a language minority group. If the jurisdiction is unable to prove that the proposed change is free of a discriminatory purpose or effect, the federal court will deny the requested judgment, or in the case of administrative submissions, the Attorney General will object to the change, and it remains legally unenforceable.

See U.N. High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, *Written Replies to the Questions Put By the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America*, Answer to Question 4, p. 16, U.N. Doc. CERD/C/USA/6 (March 7, 2008). In sum, according to our own State Department, which represents the views of the President, the pre-clearance requirement of Section 5 functions to enforce the United States' obligation to secure the right to vote under both the ICERD and the ICCPR.

The United Nations views the United States' implementation of the Voting Rights Act as fulfilling its treaty obligations and giving force to the ICERD and the ICCPR. During its first appearance before the Human Rights Committee to assess United States compliance with the ICCPR, the Human

Rights Committee remarked on the importance of the Voting Rights Act within the United States. According to the Committee,

> [t]he right to vote, enshrined in articles 25 and 27 of the [ICCPR], was at the core of American democracy. The Fifteenth Amendment to the Constitution prohibited the denial of voting rights on account of race, colour or previous condition of servitude and the Voting Rights Act of 1965 and its amendments authorized the Civil Rights Division and private parties to file lawsuits in cases of violation. The Act also banned literacy tests and other devices used to disqualify minority voters. The Civil Rights Division accorded top priority to ensuring that all Americans enjoyed the right to vote.

See U.N. CCPR, 53th Sess., 1401 mtg. at ¶ 21, U.N. Doc. CCPR/C/SR.1401 (April 17, 1994). Recently, in a 2007 report to the United Nations, the Executive Branch announced that, in July 2006, Congress reauthorized the Voting Rights Act for 25 years, which includes an extension of the pre-clearance requirement in Section 5. *See* U.N. CERD, *Reports Submitted by State Parties Under Article 9 of the Convention: Sixth periodic reports*, ¶ 199, U.N. Doc. CERD/C/USA/6 (May 1, 2007); *see also* U.N. CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding observations of the CERD Committee*, ¶ 2, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

II

THE POLITICAL INTERPRETATION THAT OUR ICCPR AND ICERD OBLIGATIONS ARE FULFILLED IN PART BY THE VOTING RIGHTS ACT IS A LEGITIMATE BASIS UPON WHICH TO UPHOLD SECTION 5 BECAUSE THE COURT HAS TRADITIONALLY ACCORDED GREAT DEFERENCE TO CONGRESS AND THE PRESIDENT ACTING INDEPENDENTLY OR IN CONCERT TO MAKE, IMPLEMENT, INTERPRET, OR ENFORCE TREATIES

Because treaties, like constitutional provisions and federal statutes, stand as supreme federal law, their interpretation ultimately rests with the Court. *See United States v. Schooner Peggy*, 5 U.S. 103, 109 (1801). Over two hundred years ago, Justice Marshall made it clear that the judicial power vested in the United States Supreme Court "extends to. . . treaties. . . ." *Id.* As recently as three years ago, the current Court maintained "if treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court.' " *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353-54 (2006) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000) (opinion of Stevens, J.) ("At the core of [the judicial] power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law"); *Hoffmann-*

La Roche Inc. v. Sperling, 493 U.S. 165, 175 (1989), *citing Osborn v. Bank of the United States*, 9 Wheat. 738, 819 (1824) (where a "case or controversy" exists, ("[Art. III, § 2, cl. 1] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it.").

However, the fact that juridical power extends over treaties does not mean that courts may "go behind [a properly executed and ratified treaty] for the purpose of annulling its effect and operation, than they can behind an act of Congress." *Fellows v. Blacksmith*, 60 U.S. 366, 372 (1856); *see also United States v. Old Settlers*, 148 U.S. 427, 466 (1893) (holding that the Court may not declare a treaty inoperative on grounds of fraud or duress because partaking in such deliberations goes behind a treaty and is "not within the province of a court."). Rather, when exercising its power to determine the interpretation of treaties, the Court has traditionally accorded great deference to the political branches, explaining that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).[25]

[25] See also *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921) ("While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."); *United States v. Curtiss-Wright Export*

This deferential stance toward political administration of treaties is grounded in the Court's recognition that it is in the country's best interest to have the government speak with one voice in dealing with other nations, as well as the Court's respect for the particular expertise of those government agencies charged with treaty negotiation, ratification, implementation and enforcement. *See Sullivan v. Kidd*, 254 U.S. 433, 442 (1920); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184 (1982); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999).[26] Thus, judicial

Corp., 299 U.S. 304, 321 (1936) ("The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution directs the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information 'if not incompatible with the public interest.' A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned."); *Sumitomo Shoji Am v. Avgliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight"); *O'Connor v. United States*, 479 U.S. 27, 32-33(1986) ("In determining the proper construction of an agreement implementing an article of a treaty, the consistent application of the agreement by the executive branch of the Federal Government is a factor that is entitled to great weight."); *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1993); *El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155,167 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

[26] For a comprehensive study of the historical deference this and other federal courts have accorded to political implementation, interpretation, and enforcement (or non-enforcement) of treaties, see Tim Wu, Treaties' Domains, 93 Va. L. R. 571 (2007).

deference to the political branches in the implementation and administration of treaties operates on at least three levels: deference when the executive branch acts to make or interpret a treaty; deference when the legislative branch acts to implement and interpret a treaty; and deference when both political branches act in concert to administer a treaty.

A. The Court Has Traditionally Deferred To the President's Power to Make and Interpret Treaties

The Court has long acknowledged that, consistent with the power vested in the President under Article II of the Constitution, the executive enjoys broad discretion to make treaties. *See Curtiss-Wright*, 299 U.S. at 320 (stating that in the arena of foreign policy the executive branch has a "better opportunity of knowing the conditions which prevail in foreign countries.") As "the sole organ of the nation in its external relations, and its sole representative with foreign nations," the President enjoys "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Id.* This "degree of discretion" extends to the President's power to both make and to interpret treaties, such that when ruling upon the meaning of treaties, the Court has always given great weight to the executive branch's interpretations of our treaty obligations. *See Charlton v. Kelly*, 229 U.S. 447,468 (1913); *see also Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933) (stating that the negotiations and diplomatic correspondence of the contracting parties to a treaty, while not conclusive, should be given great weight.) The Court put it best in *Kidd* when it explained:

> While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight.

254 U.S. at 442.[27]

Thus, in *Sumitomo Shoji America, Inc. v. Avagliano*, in ruling on a claim by a Japanese trading company that pursuant to the Friendship, Commerce, and Navigation treaty between the United States and Japan, it was exempt from discrimination suits brought under Title VII of the Civil Rights Act, the Court relied on the Department of State's interpretation of the treaty. 457 U.S. 176, 184 (1982). The Court explained that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight," *id.* at 184-85, and that "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpreta-

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[27] *See also Collins v. Weinberger*, 707 F.2d 1518, 1522 (D.C. Cir.1983) ("Courts should defer to such executive actions provided they are not inconsistent with or outside the scope of the treaty."); *United States v. Noriega*, 808 F. Supp. 791,796 (S.D. Fl. 1992) ("The Court acknowledges that conducting foreign policy is generally the province of the Executive branch."); *Iwonowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 486 (N.J. 1999) ("It is evident that the executive branch, the department responsible for negotiating international agreements, considers claims arising out of World War II as falling within the ambit of government-to-government negotiations. The interpretations of the parties to a treaty, while not binding, are entitled to significant weight.")

tion follows from the clear treaty language, [the Court] must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Id.* at 185. Similarly, in *Tsui Yuan Tseng*, in finding, based on the Warsaw Convention, that an airline passenger was not entitled to recovery for an intrusive security search, the Court reasoned that it "has traditionally considered as aids to a treaty's interpretation its negotiating and drafting history. . .and the post-ratification understanding of the contracting parties." 525 U.S. at 156. The court deferred to an amicus curiae brief from the United States government, holding that "the reasonable view of the Executive Branch concerning the meaning of an international treaty ordinarily merits respect." *Id.*

B. *The Court Has Similarly Shown Great Deference to Congress' Power to Implement and Interpret Treaties*

Although the Court has traditionally looked to the Executive Branch as the predominant actor in the domain of treaties, it has also been respectful of and deferential to the power of Congress to implement treaties. *See Foster v. Neilson*, 27 U.S. 253, 314-15 (1829), overruled on other grounds by *United States v. Percheman*, 32 U.S. 51 (1833), ("when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.")

Congressional treaty power primarily resides in two areas. The first area is the advice and consent provided by the Senate for treaty ratification. The second area is congressional discretion to enact

appropriate legislation, thereby choosing how a particular non-self-executing treaty obligation is to be enforced in the United States. Once Congress chooses to enact a statute for purposes of implementing a treaty, the statutory text completely supersedes the treaty regime as a basis for judicial enforcement, such that "a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute." *Baker v. Carr*, 369 U.S. 186, 212 (1962). But, even when Congress has chosen not to enact specific legislation implementing a treaty, federal courts, again deferential to congressional authority, have always looked to the passage of prior legislation as a sign of congressional intent regarding the matter covered by the treaty in question. Certainly, we do not lack examples of courts deferring to prior legislation as a basis for declining to independently enforce subsequent non-self-executing treaty obligations for which Congress has not passed implementing legislation.[28] Indeed, even when Congress appears to act in a manner incon-

[28] *See, e.g.*, *Beazley v. Johnson*, 242 F.3d 248, 266 (5th Cir. 2001); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (holding that a right to vote under Article 25 of ICCPR is not an independently enforceable right under U.S. Law); *Heinrich v. Sweet*, 49 F. Supp 2d 27, 43 (D. Mass. 1999) (finding that plaintiffs have adequate domestic remedies for claims of "crimes against humanity"); *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999) (holding that the ICCPR does not create a right of private action under which the plaintiff can successfully state a claim); *White v. Paulsen*, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (reasoning that "the United States Senate expressly declared that the relevant provisions of the ICCPR were not self-executing when it addressed this issue in providing advice and consent to the ratification"); *In re Extradition of Cheung*, 968 F. Supp 791, 803 n.17 (D. Conn. 1997) (stating that the ICCPR cannot support an extradition defense.).

sistent with a United States treaty obligation, federal courts have nonetheless deferred to congressional treaty prerogative by refusing to assume a separate power on the part of the judiciary to independently enforce treaties. *See*, *e.g. Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("holding that if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control"); *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, 155 F. 842, 843-45, 849 (1st Cir. 1907) (holding that if "Congress has legislated on the topic since the treaty was ratified. . . that subsequent legislation, so far as it expresses any Congressional purpose inconsistent with any claimed construction" of a treaty "that purpose controls"); *Rousseau v. Brown*, 21 App. D.C. 73, 76-77 (1903) (holding a patent treaty nonbinding absent an act of Congress).

C. Deference to the Political Branches is Particularly Apt When the President and Congress Act in Concert

Above and beyond the deference this Court has traditionally accorded to the executive and legislative, acting pursuant to each branch's independent treaty powers, it has shown even greater deference when the political branches act in concert to conduct foreign affairs. More than fifty years ago, the Court made it clear that no greater deference is owed than when the President conducts foreign affairs pursuant to an express or implied authorization of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring). As Justice Jackson wrote,

> When the President acts pursuant to an express or implied authorization of Congress, his

> authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . [An action] executed by the president pursuant to an act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

Id. at 635-36.

Thus, in *Curtiss-Wright*, upon which Justice Jackson relied in his *Youngstown* concurrence, the Court declined to rule on the constitutionality of an executive order, issued pursuant to a congressional resolution, barring the sale of weapons by an American company to a foreign company. 299 U.S. at 319. The court reasoned that, in the arena of foreign affairs, congressional delegation of power to the President should be given great weight. *Id.* The Court came to the same conclusion in *Dames & Moore v. Regan*, when, relying on Justice Jackson's *Youngstown* concurrence, it confirmed the President's authority to order the transfer of Iranian assets, holding that because the President, in conducting foreign affairs, acted "pursuant to specific congressional authorization, [his actions were] supported by the strongest of presumptions and the widest latitude of judicial interpretation." 453 U.S. 654, 674 (1981).[29]

But, even when Congress is less than explicit, judicial deference still attaches to executive treaty interpretation if Congress remains silent in the face

[29] By contrast, the Court has shown less deference when the political branches appear to be at odds in the area of foreign affairs. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

of actions by the President, committing the United States to a particular treaty regime. *See*, *e.g. Cook v. United States*, 288 U.S. 102 (1933) (holding that a treaty is not abrogated by the subsequent re-enactment of a law that does not clearly express congressional intent to abrogate the treaty and any doubt as to the construction of the law in relation to the treaty should be deemed resolved by the consistent departmental practice existing before its enactment); *Nagle v. Loi Hoa*, 275 U.S. 475, 481-82 (1928) (concluding that re-enactment of section six of the amended Exclusion Act, with no change, and subject to the provisions of an expired treaty, "must be accepted as a legislative approval of the practical construction the section had received" by the agency charged with regulating immigration.); *TransWorld Airlines*, *Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (stating that "[l]egislative silence is insufficient to abrogate a treaty."); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 492-93 (1931) (contending that "[t]he reenactment of [a] statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive evidence of a legislative recognition and approval of the statute as constructed."); *Brewster v. Gage*, 280 U.S. 327, 337 (1930) (stating that "[t]he subsequent reenactment in later Acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation" and "[t]he subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them.")

D. The Political Interpretation that the Voting Rights Act Fulfills in part our ICCPR and CERD Obligations Deserves the Same Deference the Court has Traditionally Accorded to Treaty Interpretation by the Political Branches

Here, the Executive Branch has declared our obligations under both the ICERD and the ICCPR to have been met by, *inter alia*, the Voting Rights Act of 1965 and the 2006 reauthorization of that Act which includes an extension of Section 2 and the Section 5 preclearance provision. Congress has remained silent in the face of these Executive Branch declarations. Consequently, this Court should uphold Sections 2 and 5 of the Voting Rights Act as measures advanced by the Executive Branch as enforcing the obligations under the ICERD and the ICCPR, both of which the United States has decided to treat as non-self-executing treaties. Any other conclusion runs the risk of compromising United States' compliance with these treaty obligations and sending mixed messages to those with whom we have entered into multilateral agreements such as the ICERD and the ICCPR.

III

IT IS FITTING THAT THE VOTING RIGHTS ACT SHOULD BE ONE OF THE BASES FOR MEETING OUR ICCPR AND CERD OBLIGATIONS BECAUSE OUR HOMEGROWN NOTIONS OF EQUALITY HAVE HISTORICALLY BEEN INSPIRED BY INTERNATIONAL HUMAN RIGHTS NORMS

The genius of the American system of constitutional government is not that it emerged fully

mature at our founding, but that our homegrown moral philosophy of civil and political rights has always had a symbiotic relationship with international human rights norms.

Our constitutional government is at its core a realization of the European Enlightenment's conception of the relationship between the individual and the state.[30] Thomas Jefferson was directly channeling John Locke,[31] John Stuart Mill,[32] Immanuel Kant[33] and Jean-Jacques Rousseau[34], among others, when he wrote in the Declaration of Independence: "We hold These truths to be self-evident, that all Men are created equal, that they endowed by their creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."[35]

This vision of the Enlightenment was embodied not just in the Declaration of Independence but was also reflected in both the structure of government

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[30] *See* Alasdair MacIntyre, *After Virtue* 53-55 (2d ed., 1984); Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 Stan. L. Rev. 703, 715-16 (1975).

[31] *See* John Locke, *Two Treatises of Government* 271 (P. Laslett ed. Cambridge University Press 1988) (1690).

[32] *See* John Stuart Mill, *On Liberty* 14 (John Gray ed. Oxford Univ. Press 1991) (1859).

[33] *See* Immanuel Kant, *Political Writings* 61, 75 (Hans Reiss ed. & H. B. Nisbet trans., Cambridge Univ. Press 1991) (1793).

[34] *See* Jean-Jacques Rousseau, *Discours sur l'économie politique*, in 3 Jean-Jacques Rousseau, *Ouevres Completes* 239, 263 (Bernard Gagnebin & Marcel Raymond eds., 1964) (1775). For an examination of Rousseau's philosophy and its influence on American constitutionalism, *see* Nelson Lund, *Rousseau and Direct Democracy*, 13 J. Contemp. Legal Issues 459 (2004).

[35] The Declaration of Independence, ¶ 1 (U.S. 1776).

adopted by the Constitution and in its enumeration of individual rights. From a structural perspective, the Constitution embodied "a philosophy of government that was highly protective of individual liberty and manifestly Lockean. Separation of powers between the executive, legislative, and judiciary, with checks and balances built into the system to prevent overweening government or, in the worst case, tyranny, is straight from the classical liberal, Lockean playbook." Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of Lochner v. New York*, 1 N.Y.U. J. L. & Liberty 515, 535 (2005); *see also* Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (1988). From a rights perspective, the Bill of Rights, as a charter of "negative" liberties, protecting certain areas of individual freedom from state interference, is at bottom a realization of the Enlightenment's idea of placing individual liberty and autonomy at the center of the political universe.[36]

For two hundred years, the international pedigree of our constitutional system was plainly reflected in our jurisprudence. In 1783, Blackstone described the law of nations as "a system of rules, deducible by natural reason and established by universal consent among the civilized inhabitants of the world . . . adopted [in England] in its full extent by the common law, and . . . held to be a part of the law of the land." 4 W. Blackstone, Commentaries 66-67 (reprint 1978). Throughout the Nineteenth and much of the Twentieth Century, this very Court would consistently preserve Blackstone's account such that the

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[36] David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986).

use of international norms to shape and inform domestic law was neither uncommon nor terribly controversial. *See*, *e.g.*, *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (1784) (held that assault by U.S. citizen on French diplomat constituted a violation of international law, which formed a part of domestic law); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (held that international law creates a domestic cause of action in seizure of foreign vessel on international waters); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (used law of nations to examine Virginia statute to confiscate property of British subjects base); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 36 (1801) (held that international law authorized U.S. salvage of Hamburg vessel recaptured from French); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (held that international law gave Danish plaintiff cause of action for seizure of property by U.S. defendant); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (held that international law bound U.S. court in contract action between British and Argentine subjects); *Bentzon v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (process for determining the law of nations governing belligerent and neutral rights); *The Antelope*, 23 U.S. (10 Wheat) 66 (1825) (used international law to examine illegality of the slave trade); *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871) (awarded damages against a British vessel for the accidental sinking of an American ship, noting that "no single nation can change the law of the sea."); *United States v. Arjona*, 120 U.S. 479, 487 (1887) (stated that international law imposed a positive obligation upon the United States to punish the counterfeiting of foreign notes.) But perhaps no formulation expressed it bet-

ter than Justice Gray's well known statement in *The Paquete Habana*:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

175 U.S. 677, 700 (1900).

In terms of our struggle for racial equality, almost from the moment the first African slaves disembarked in Virginia in 1669, there arose in the colonies an anti-slavery movement grounded in European Quaker philosophy. *See* Ruth A. Ketrin, *Charles Osborn in the Anti-Slavery Movement* (1937). Thus, in 1657, George Fox, a Quaker leader, published a document titled "To Friends beyond the sea that have Black and Indian Slaves," in which he argued that "all men of earth were of one blood." *See* Herbert Aptheker, The Quakers and Negro Slavery, 25 Journal of Negro History 332 (1940). As the abolitionist movement began to take root, northern blacks argued for American citizenship by pointing out that under international customary law, "the strongest claim to citizenship is birth-pace" and that "in whatever country or place you may be born . . .you are in the first and highest sense a citizen." *This Country Our Only Home*, 1 Colored x American, May 9, 1840. Frederick Douglas challenged the constitutional compromise that denied people of African descent their personhood and citizenship based on natural law and other concepts that were advanced by the philosophers of the European Enlightenment.[37]

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[37] David Brion Davis, *The Emergence of Immediatism in British and American Antislavery Thought*, *in* Articles on American Slavery 85, 85 (Paul Finkelman ed., 1989).

Northern and Southern abolitionists found and cited as inspiration the 1803 slave revolution in Haiti led by the former slave Toussaint L'Ouverture. *See* Robert C. Morris, *Reading, "Riting," and Reconstruction: The Education of Freedmen in the South 1861-1870* 199 (1981).

During the Jim Crow era, intellectuals and activists such as W. E. B. DuBois examined parallels between the struggle for Irish Independence from the British and the African-American struggle for equal rights. *See* Susan M. Glisson, *The Human Tradition in the Civil Rights Movement 80* (2006). These advocates used international mechanisms to pressure the United States government by, *inter alia*, petitioning the United Nations for relief from the laws that maintained the racial segregation of Jim Crow as a matter of constitutional equality. *See* Carol Anderson, *Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1956* 20 (2003). The first such petition to the United Nations Commission on Human Rights was submitted by the National Negro Congress (NNC) on January of 1946. *Id.* In 1947, a supplement to the original draft of the NNC United Nations petition was submitted, expanding the focus from African Americans to all peoples of color in the United States. *Id.* at 89. The supplement also stated how Jim Crow Laws in the United States discriminated against Third World U.N. delegates. *Id.* The supplement concluded that the Negro problem in America was more than an internal problem, but rather had international implications that should be addressed by the world. *Id.* In 1947, the National Association for the Advancement of Colored People (NAACP) filed a petition to the United Nations titled, "An Appeal to the World: A Statement on the

Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United States for Redress." Azza Salama Layton, *International Politics and Civil Rights Policies in the United States 1941-1960* 51 (2000).

These petitions were rooted in notions of freedom, liberty, self-determination and natural rights through international laws, such as the Universal Declaration of Human Rights, on which the United States placed its imprimatur at the close of World War II.[38] Leaders in the civil rights movement of the 1950s and 1960s used human rights norms and standards to state their claims in ways the Constitution seemed unable to comprehend. Whether James Nabrit's use of the Universal Declaration of Human Rights to challenge the continuing constitutionality of segregated public schools in the District of Columbia, or Dr. Martin Luther King, Jr.'s final speech before his death in which he placed the labor struggle of Memphis' black garbage collectors in the broader context of "the human rights revolution," or the statement by Malcolm X that "the day the black man turns from civil rights to human rights, he will take his case into the halls of the United Nations in

[38] Eleanor Roosevelt, On The Adoption of the Universal Declaration of Human Rights (December 9, 1948) (noting that "[t]he long and meticulous study and debate of which this Universal Declaration of Human Rights is the product means that it reflects the composite views of the many men and governments who have contributed to its formulation. . . . Taken as a whole the Delegation of the United States believes that this is a good document—even a great document—and we propose to give it our full support.") http://www.americanrhetoric.com/speeches/eleanorrooseveltdeclarationhumanrights.htm; *see also* William L. Patterson, *We Charge Genocide: The Crime of Government Against the Negro People* vii (1970).

the same manner as the people in Angola, whose human rights have been violated by the Portuguese in South Africa,"[39] human rights have been an important reference point for those struggling for full personhood and citizenship for all regardless of race, color or creed.[40]

These examples demonstrate the historical tradition of viewing racial justice in America as both a domestic and an international imperative. This custom is made more salient by our government's agreement, by way of signature and ratification, to be bound by treaties such as the ICERD and the ICCPR. That this agreement is subject to conditions is beyond question. What is crucial to the points made in this brief is that assuming, *arguendo*, these conditions are legitimate, then the position advanced by at least two presidents is one that recognizes the Voting Rights Act as crucial to satisfying our treaty obligations under both ICERD and ICCPR.

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[39] Malcolm X, The Leverett House Forum of March 18, 1964, in Malcolm X: Speeches at Harvard 143-44(Archie Epps, ed. 1991)

[40] *See e.g.* James Jennings, *The International Convention on the Elimination of All Forms of Racial Discrimination (CERD): The Inernational Convention on the Elimination of All Forms of Racial Discrimination: Implications for Challenging Racial Hierarchy*, 40 HOW. L.J. 597 (1997); Gay J. McDougall, *The International Convention on the Elimination of All Forms of Racial Discrimination (CERD): Introduction: Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571)(1997); Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 Harv. Hum. Rts. J. 15, 18 (1996).

CONCLUSION

For the foregoing reasons, we pray the Court uphold the decision of the United States District Court for the District of Columbia.

Respectfully submitted,

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